

SERVICE DATE – NOVEMBER 18, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35838

WISCONSIN & SOUTHERN RAILROAD L.L.C.—ACQUISITION AND OPERATION
EXEMPTION—CITY OF FITCHBURG AND VILLAGE OF OREGON, WIS.

Digest:¹ This decision allows a rail carrier to acquire a freight rail operating easement over a dormant 15-mile line owned by two municipalities and restart common carrier freight rail service on the line, subject to standard employee protective conditions.

Decided: November 17, 2014

By petition filed on August 22, 2014, Wisconsin & Southern Railroad L.L.C. (WSOR) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10902 to acquire an exclusive freight rail operating easement and operate a 15-mile rail line known as the Evansville Line (the Line) that is owned by the City of Fitchburg and the Village of Oregon, Wis. (the Municipalities). The Line extends between milepost 119.0, near Evansville, Wis., and milepost 134.0, near “MX” (a crossing of WSOR near Madison, Wis.), in Dane, Green, and Rock Counties. By separate petition also filed on August 22, 2014, WSOR seeks a waiver of the 60-day employee notice requirement of 49 C.F.R. § 1121.4(h).

For the reasons discussed below, we will grant the petition for exemption and the petition for waiver of the employee notice requirement.

BACKGROUND

WSOR, a Class II rail carrier, seeks an exemption from the Board to acquire an exclusive freight rail easement over the Municipalities’ 15-mile rail line extending between Evansville and Madison. The Municipalities acquired the Line in 1998 through the offer of financial assistance process under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c), when the prior owner sought to abandon the Line.² WSOR states that there has been no freight rail traffic on the Line since

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See Union Pac. R.R.—Aban. Exemption—in Rock, Green, & Dane Cntys., Wis., AB 33 (Sub-No. 119X) (STB served Nov. 20, 1998).

1997. According to the petition, a shipper seeking rail service is locating in the Village of Oregon and has contacted the Wisconsin River Rail Transit Commission (WRRTC) about obtaining service.³ As such, WRRTC has requested that WSOR initiate service over the Line. Consequently, the Municipalities seek to transfer the exclusive freight rail easement to WSOR. In a related proceeding, the Municipalities intend to transfer the physical assets of the Line to WRRTC.⁴

WSOR states that it will enter into an agreement with the Municipalities whereby WSOR would acquire the exclusive freight rail easement for continued rail operations. According to WSOR, the Freight Easement Deed and Agreement between the parties would not contain any provision that would prohibit or limit WSOR from interchanging traffic with a third party. Further, WSOR states that acquisition of the freight rail easement would not result in significant changes in carrier operations.⁵

Concurrent with this petition for exemption, WSOR has also filed a petition seeking a waiver of the employee notice requirements of 49 C.F.R. § 1121.4(h), which provide that the exemption may not become effective until 60 days after the carrier certifies to the Board that it has posted at the workplace of the affected employees and served on their unions a notice

³ In Docket No. FD 35843, WRRTC states that it is a governmental entity representing a consortium of nine counties and is authorized under Wisconsin law to acquire transportation systems, including freight rail systems, and to lease or otherwise contract for the operation of such systems.

⁴ WRRTC has concurrently filed a petition for declaratory order in Wisconsin River Rail Transit Commission—Petition for Declaratory Order—in Dane, Green, & Rock Counties, Wisconsin, FD 35843. There, WRRTC has sought a finding that its acquisition of the right-of-way and railroad assets of the Line would not render it a rail common carrier. Closing of the sale is contingent upon a favorable Board ruling. In a decision served today in that proceeding, the Board finds that WRRTC's proposed acquisition of the assets of the Line does not require Board authorization under 49 U.S.C. § 10901 because the transaction comports with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991) and its progeny.

⁵ A separate pair of petitions, one for a State of Maine declaratory order and one for an acquisition and operation exemption, have been filed with respect to a similarly structured transaction involving 69.62 miles of rail line in Wisconsin known as the Reedsburg Line. See Wis. Dep't. of Transp.—Pet. for Declaratory Order—Reedsburg Line Near Madison, Wis., FD 35854; Wis. & S.R.R.—Acquis. & Operation Exemption—Union Pac. R.R., FD 35848. It appears that the Reedsburg Line extends and connects to the Line at issue here at railroad milepost 134.0, near Madison, Wis. The Board issued decisions in these dockets on November 6, 2014.

regarding the jobs expected to be available, the terms of employment and principles of employee selection, and the lines to be transferred. In support of this request, WSOR states that there has been no freight rail traffic on the Line since 1997, no employee of WSOR has ever worked on the Line, and no WSOR employee would be affected by the acquisition of the freight rail easement. Further, WSOR states that posting notices on the Line would not provide notice to the Municipalities' employees because no employee of the Municipalities has ever worked on the Line and, therefore, none of the Municipalities' employees would be affected as a result of the sale. No opposition to the petition or request for waiver has been filed.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10902, a rail line acquisition by a Class II carrier would require an application to, and authorization by, the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Here, we find that an exemption from the prior approval requirements of 49 U.S.C. § 10902 is consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. An exemption from the application process would expedite regulatory action and reduce regulatory barriers to entry and exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption would also foster sound economic conditions and encourage efficient management by reinstituting rail service on a once dormant rail line, thereby allowing WSOR to serve the new shipper locating in the Village of Oregon. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy would not be adversely affected by use of the exemption process.

Moreover, regulation of this transaction is not needed to protect shippers from the abuse of market power. WSOR is acquiring the exclusive freight rail easement over a line that has been out of service for 17 years. Further, WSOR has demonstrated that there would be no anticompetitive effects as a result of the proposed transaction. Specifically, WSOR notes that there would be no significant changes in carrier operations as a result of the transaction, and the Freight Easement Deed and Agreement between WSOR and the Municipalities would not contain any provision that would prohibit or limit WSOR from interchanging traffic with a third party.⁶

⁶ Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees. Section 10902(d) provides for labor protection in line acquisitions by Class II rail carriers. As a condition to this exemption, any employees affected by the acquisition will be protected as required by 49 U.S.C. § 10902(d), subject to the standards and procedures established in Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad, 2 S.T.B. 218 (1997), aff'd in relevant part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998).

Waiver of 49 C.F.R. § 1121.4(h). As noted, WSOR has petitioned for waiver of the 60-day labor notification requirement under 49 C.F.R. § 1121.4(h). The purpose of that requirement is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation.⁷ The Board takes seriously the requirements of the rule, but it does not appear that the purpose behind the notice requirement would be thwarted by the requested waiver.

While the Board does not ordinarily waive the employee advance notice requirement, it is very unlikely that any railroad employees would be adversely affected by waiver of the requirement here. There has been no rail traffic on the Line since 1997. No employees of the Municipalities have worked on the Line, and no employees of WSOR would be adversely affected by the acquisition. Accordingly, there is no need for advance notice here, and the requested waiver will be granted.⁸

Environmental and Historic review. This transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in a significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(1) because there are no plans to alter railroad properties 50 years old or older, and further Board approval is required to abandon any service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁷ See Acquis. of Rail Lines Under 49 U.S.C. 10901 & 10902—Advance Notice of Proposed Transactions, 2 S.T.B. 592, 597 (1997).

⁸ See, e.g., Wheeling & Lake Erie Ry.—Acquis.& Operation Exemption—CSX Transp., Inc., FD 34341 (STB served Sept. 2, 2003) (finding advance notice not required where no railroad employees will be affected by the proposed transaction).

It is ordered:

1. Under 49 U.S.C. § 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. § 10902, subject to the employee protective conditions implementing 49 U.S.C. § 10902(d) as provided in this decision.

2. WSOR's request for a waiver of the employee notice requirement under 49 C.F.R. § 1121.4(h) is granted.

3. Notice will be published in the Federal Register.

4. The exemption will become effective on December 18, 2014.

5. Petitions to stay must be filed by November 28, 2014. Petitions for reconsideration must be filed by December 8, 2014.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.